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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 12 2006

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a post-doctoral researcher at the Center for Excellence in Forging Technology at the Ohio State University (OSU) and had just accepted a position as a product development engineer at Isatec Tool & Engineering Company. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Accompanying the petitioner's initial filing is a document, signed by the petitioner, showing that the petitioner accepted Isatec's job offer on August 8, 2005, and that employment would start "no earlier than 10/01/05 but no later than 10/15/05." On September 7, 2005, the petitioner completed and signed Form ETA-750B, Statement of Qualifications of Alien. On that form, the petitioner identified his "Prospective Employer" not as Isatec, where he was shortly to begin working, but as OSU, where he was in his final weeks of employment.

In an introductory letter accompanying the initial filing, counsel states:

> [The petitioner] is a superb research scientist whose innovative work on energy savings during metal-forming and making lightweight parts for fuel economy vehicles is already making a significant real-world impact in industry. . . . One of his projects in China has already evolved into U.S. commercial software called "NX Progressive Die Wizard" in Uni-Graphics, which is currently being used in industries worldwide. . . .
>
> We will show that [the petitioner's] achievements at this point are having an impact far beyond what most researchers can even expect in their lifetime.

Counsel goes on to discuss several research projects that the petitioner undertook as a graduate student and as a postdoctoral researcher. Counsel does not, however, explain how the petitioner's then-imminent employment at Isatec would serve the national interest. Counsel mentions Isatec only insofar as to state that Isatec's job offer

demonstrates the petitioner's standing in the field. A track record of past research achievement does not, by itself, justify a waiver; it must accompany evidence that the petitioner will continue to be in a position to make comparable future achievements. The national interest waiver is not merely a reward for past efforts.

The petitioner submits photocopies of several witness letters. All of these letters were originally prepared in support of an earlier petition.

Dr. [redacted] technology manager for Supporting Industries at the U.S. Department of Energy, states:

> I am pleased to acknowledge that [the petitioner] is the coordinator for the lubrication research on the Department of Energy-Industrial Technologies Program (DOE-ITP) sponsored project . . . at the Ohio State University, Columbus, Ohio.
>
> From the DOE-ITP point of view, granting the said petition would be in public interest, since the project [the petitioner] is working on can be regarded as significantly important in serving to enhance the energy competitiveness of the U.S. industry, and contributing to meet the energy and environmental goals of the DOE Supporting Industries of the Future focus area. The project investigates innovative die material and lubrication strategies for cleaning and energy conserving forging technologies which will work towards improving competitiveness and working environment of the U.S. metal forming industry, and could save the U.S. metal forming industry as much as billions of dollars annually.

Dr. [redacted], manager of Die Engineering Analysis for the Metal Fabricating Division of General Motors,[1] states:

> Because of my involvement in the USAMP-AMD Project, "**Active Flexible Binder Control System for Robust Stamping**," in which [the petitioner] has been the major researcher for the Project from May 2001 to October 2002; I know very well of [the petitioner's] research competencies and contributions.
>
> USAMP is the abbreviation for "United States Automotive Materials Partnership." The objective of the project "USAMP-AMD" is to enhance US automotive industry'[s] competitiveness by improving automotive fuel economy through the use of lightweight sheet materials, such as aluminum alloy and magnesium alloy. The flexible binder control system technology developed by [the petitioner's] research group is one of the several technologies in manufacturing automotive stampings using these lightweight materials. . . .
>
> [The petitioner] has an excellent background in metal forming, computer-based stamping simulation and adaptive control theory. In our Project of flexible binder control system, he developed a so-called adaptive control strategy, which can predict an optimal binder force trajectory within a minimum amount of computation time. The algorithm has been

[1] Dr. [redacted] repeatedly refers to his employer, General Motors, as "General Motor Corp." or "General Motor Company."

> successfully implemented to improve our stamping processes. . . . In [the petitioner's] innovation, the deformation of blank that causes splits, wrinkles and springback is continuously monitored and mitigated by continuously adjusting the blank holder force, thus it is possible to form a part without splits, wrinkles and springback. . . .
>
> In summary, [the petitioner] is one of the most valuable researchers and scientists in the fields of sheet metal forming process and dies, and advanced stamping simulations and controls.

Counsel also states: "One of his projects in China has already evolved into U.S. commercial software called 'NX Progressive Die Wizard' in Uni-Graphics, which is currently being used in industries worldwide." Dr. [redacted] manager of the Mold/Die Development Team at UGS, states:

> UGS manages or creates more than 40 percent of the world's 3-Dimensional data, with products including NX, SolidEdge, Ideas and Nastran etc. . . . Our Mold & Die Tooling Department develops software packages for Mold and Die Design. NX Progressive Die Wizard, which provides efficient and effective design solutions to progressive die manufacturers, is one of our major products. . . .
>
> The State Key Laboratory of Plastic Forming Simulation and Die & Mold Technology at Huazhong University of Science & Technology (HUST) is the best research unit in China, and is the most active in the world when it comes to developing computer aided design systems for a progressive die system. UGS has collaborated with HUST since 1998, when [the petitioner] was working on the progressive die CAD system development project at HUST. During that time, [the petitioner] proposed a revolutionary feature mapping approach [that] was the basis for a mainstay computer aided design concept in the progressive die industry. . . .
>
> From 1998 to 2000, [the petitioner] was working on the die structure design module and proposed a feature mapping approach to efficiently generate progressive die structure.
>
> His approach was initially applied in the multiple intelligent agent progressive die computer aided design system, and later evolved into the feature extracting and mapping functions of developing process design in our current product, "NX progressive die wizard." This has subsequently become the most popular progressive die design software in the US and around the world[redacted]

We note that Dr[redacted] does not state that the petitioner developed NX Progressive Die Wizard; rather, the petitioner developed an approach that was later incorporated into one component of NX Progressive Die Wizard.

Professo[redacted] irector of the Center for Excellence in Forging Technology at OSU, describes the sheet metal drawing process in greater detail and explains the petitioner's work in that area:

> A typical sheet metal drawing process is composed of three steps, 1) blank holder moves down to clamp the blank; 2) punch moves down to form the sheet; 3) remove the tooling and take out the part. The blank holder plays a key role in the drawing process by suppressing the wrinkling failure. A well-designed blank holder force trajectory can improve the formability of sheet materials. In the process of predicting blank holder force, the early reporting of wrinkling which happens at both cup wall and flange areas is critical. Before [the petitioner], wrinkling management was only conducted on the part flange area, which was limited to the drawing of simple geometry. [The petitioner] developed a geometrical-based sidewall wrinkling measuring method and successfully predicted a variable blank holder force to improve drawability of a challenging conical geometry around 10%. . . .
>
> At [the] beginning of 2004, [the petitioner] started to work on the forming of high strength steel sheet, which is a hot area in the automobile industry. . . . [B]ecause of the increase of the steel strength, the contact pressure at the forming tool interfaces is 2-5 times higher than that of conventionally formed mild steel. Die wear happens quickly, and die life is thus shortened dramatically. . . .
>
> [The petitioner] proposed a systematic method to evaluate and develop coating systems, die material and tooling design parameters. . . . By the end of last year [2004], a proposal based on his method was granted for a multi-industry collaborative project . . . jointly funded by four industrial partners. . . .
>
> [The petitioner] is also working on developing new processes to form magnesium alloy parts, which is another cutting-edge technology area relating to making lightweight vehicles and electrical products. . . .
>
> [The petitioner] developed a unique material modeling method which describes the deformation behavior of magnesium alloys at elevated temperatures and varying forming speeds.

Prof. [redacted] states that publications will be forthcoming from the above projects. The record does not indicate whether or not any such articles actually appeared. Dr. [redacted]'s letter, dated June 20, 2005, does not mention the job offer from Isatec, nor does he otherwise indicate that he anticipates the petitioner's departure from OSU within a matter of months.

Counsel asserts that the petitioner has played leadership roles in several research projects, but the petitioner does not provide supporting documentary evidence to verify these claims.

The petitioner submits copies of several published articles, all of them in Chinese, written by the petitioner or containing citations of the petitioner's published work. Counsel claims 16 such citations, which would be a moderate number at best. Even then, all of the articles said to cite the petitioner's work are in Chinese, and only a small number contain translated and/or highlighted sections to show the citations in question. Because the petitioner failed to submit certified translations of the documents (or at least the relevant portions thereof),

the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Thus, the record does not document all 16 claimed citations. With respect to his work at OSU (which is the focus of several witness letters), the petitioner has submitted copies of unpublished manuscripts but no indication that this work has actually been published, let alone cited.

Counsel cites the petitioner's receipt of two awards from the Chinese government. Counsel claims: "in 2004 there were 250 projects which passed the initial strict recommendation criteria by the peer experts [for the Chinese Science and Technology Award]. Only 102 of these were eventually granted awards." Leaving aside the lack of corroboration for these figures, it is not clear that an award that goes to 41% of the nominees is highly exclusive or indicative of rare or lasting influence. Pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(F), recognition from government bodies (such as these awards) can form part, but not all, of a claim of exceptional ability. Exceptional ability, in turn, is not sufficient to secure a waiver.

Counsel states that the petitioner's work has been the subject of a U.S. patent application, as though the filing of such an application is, itself, a rarefied privilege rather than a more or less routine element of industrial innovation. Binding precedent already addresses this issue: "innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent." *Matter of New York State Dept. of Transportation* at 221, n.7.

Counsel states that the petitioner's job offer from Isatec is "strong testament to [the petitioner's] established reputation and influence in the field." Counsel does not explain this assertion, which seems to imply that only highly influential individuals are able to secure employment in the petitioner's field. Documentation relating to the job offer does not indicate that the petitioner would continue in the specific research projects through which the petitioner was said to benefit the United States.

The director denied the petition, stating that the record does not support numerous claims in the record, such as counsel's broad claim that the petitioner has had "an impact far beyond what most researchers can even expect in their lifetime," or the claim that the petitioner was leader of several projects prior to the filing date. On appeal, counsel does not rebut these basic findings. Instead, counsel focuses on specific weaknesses in the denial notice. While the denial is not free of flaws, the petitioner has not rebutted some key findings that, alone, suffice to warrant denial of the petition.

The director noted that a previous petition filed by this petitioner included three letters that were compromised by strong evidence of common authorship. A copy of one of those three letters was submitted with the present petition. On appeal, counsel argues that the director improperly considered evidence from a separate proceeding, and that the director must consider each proceeding independently. While there is much to be said for this argument, counsel fails to acknowledge that the initial submission for the present petition is virtually identical to the response to a request for evidence issued regarding the earlier petition. That earlier petition was denied on August 26, 2005, about two weeks before the present petition was filed. Given the denial of the earlier petition, there is nothing internally inconsistent about the director also denying a second petition that relied on basically the same evidence.

The director asserted that the record documented no citation of the petitioner's published work. As noted above, the petitioner has documented some degree of citation within China. Counsel asserts that this erroneous statement shows that the director devoted insufficient attention to the record, but we do not find that the few citations that the petitioner has documented suffice to establish eligibility.

Counsel protests that the director should have issued a request for evidence in order to put the petitioner on notice of evidentiary deficiencies. We agree that the director was incorrect in stating that the record contains "clear evidence of ineligibility," as opposed to insufficient evidence of eligibility. That being said, as noted above, another petition relying on the same evidence was denied very shortly before the filing of this petition. Thus, at the time of filing, the petitioner and counsel were demonstrably aware that the petitioner did not consider this particular evidentiary package to be sufficient. The petitioner could have included additional evidence in the new filing, but did not do so.

The most expedient remedy for the director's failure to issue a request for evidence would be to consider, on appeal, any new evidence that the petitioner would have submitted in response to a request for evidence. Several new exhibits, in fact, accompany the appeal. [redacted] a product engineer with Ghabbour Egypt Company, Cairo, Egypt, states that he was a master's degree student when he encountered the petitioner's work:

> Among all of HUST's works, [the petitioner's] is very unique and very close to the topic I chose. I therefore found [the petitioner's] webpage . . . in March 2001, and I asked for his papers and dissertation. . . .
>
> Based on [the petitioner's] function oriented assembly design concept, we developed a knowledge-based blanking die design computer aided design system. Several approaches such as the knowledge-based sheet metal feature mapping approach, part positioning tool, assembly tree description of the die system, segmental design of blanking die, and automatic positioning were introduced in [the petitioner's] papers and are discussed in our thesis.

Most of the other new exhibits on appeal concern the job offer from Isatec. Counsel states:

> [The petitioner] received an offer of employment with an annual base salary of $93,000 from ISATEC of Ohio, a tooling design and manufacturing operation which is a division of Com-Corp Industries. ISATEC supplies automobile parts such as light bulb shields to leading American automobile manufacturers such as General Motors and Ford. The company has also recently been investing in CAD/CAM software for progressive die designers in order to keep ahead of overseas competition.
>
> For ISATEC to have extended such a lucrative job offer to [the petitioner] is yet again proof of his value to U.S. industry and the national interest.

[redacted] owner of Isatec of Ohio, confirms that the company "has recently hired" the petitioner to work on "an automatic bulb shield which is installed in headlamps." Separate documentation confirms the

terms of employment. We are not persuaded that a job offer from a U.S. employer is persuasive evidence that CIS should not require a job offer from a U.S. employer, or that the position offered to the petitioner is of such a stature that the petitioner's importance to the field is self-evident.

On September 26, 2005, a technical journal invited the petitioner to review a manuscript that had been submitted for publication in that journal. Apart from the fact that this invitation was issued after the filing date, the petitioner has not shown that participation in peer review of this kind is a mark of privilege in the field rather than a shared obligation, expected of any researcher who seeks to publish his or her own work.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. The director's decision, while imperfect, did raise points that the petitioner has not adequately addressed on appeal. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee. We note that, in May 2006, an employer filed a new immigrant petition on behalf of the alien involved in this proceeding. The new petition, still pending as of the date of this adjudication, seeks a classification that requires an approved labor certification. Thus, it appears that the employer was able to obtain a labor certification for the alien.

ORDER: The appeal is dismissed.